

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
APPEAL FROM ORDER NO.612 OF 2007
IN
NOTICE OF MOTION NO.1389 OF 2007
IN
S.C. SUIT NO.2329 OF 2005**

Mitesh Kapasi

... Appellant/
Orig.Defendant

Versus

Shri Sangam Co-op. Hsg.
Soc.Ltd.

.. Respondents/
Orig.Plaintiffs

Shri A.S. Uraizee with Shri M.V. Singh for the
Appellant
Shri J.S. Kini i/b. Shri Suresh Dubey for the
Respondent

**CORAM : S.R. SATHE, J.
DATED : 28/09/2007**

ORAL ORDER :-

1. The Appellant-original defendant in S.C. Suit No.2329 of 2005 has preferred this appeal against the order passed by the Judge, City Civil Court, Bombay whereby defendant's Notice of Motion No.1389 of 2007 seeking permission to complete the specified repairing work of the suit flat in accordance with the report dated 14/10/2005 submitted by the Architect Tari was dismissed. For the sake of convenience hereafter the parties shall be referred to as 'Plaintiff' and 'defendant'.

....2/-

2. The brief facts giving rise to this appeal are as under :-

The Plaintiff is a registered Co-operative Housing Society, governing the affairs of the Society in which suit flat No.4 is situated. According to Plaintiff-Society the defendant is a trespassers in the suit flat. On 07/06/2005, Plaintiff found that defendant had demolished the entire balcony of the suit flat and trying to create separate staircase. The Society noticed that the flat owner had not paid the arrears of society dues which were to the extent of Rs.3 lakhs. When the society officer tried to ascertain the status of the defendant, defendant used abusive language. Finding that the defendant was carrying out material alterations and improvements in the suit flat illegally and without permission of the Plaintiff-Society, they filed the suit for declaration that the repairs/ renovation work carried out by the defendant in the suit flat is illegal and prayed for the permanent injunction restraining defendant from carrying out any work of repairs, renovation or alteration, additions or changing the statusquo in respect of the suit flat.

....3/-

3. Plaintiff also filed Notice of Motion No.2138 of 2005 and prayed for temporary injunction and the Trial Judge was pleased to grant ex parte ad-interim injunction against the defendant.

4. The defendant appeared in the said suit and prayed for modification of the order of injunction and sought permission to carry out certain repairs in the suit flat. The said application was strongly opposed by the Plaintiff-society. After hearing the arguments of both the learned Advocate, the learned Trial Judge rejected the defendant's application seeking modification in the initial order of injunction. Being aggrieved by the same, the defendant filed AO No.714 of 2005. However, the same was also dismissed on 10/08/2005.

5. On 20/09/2005, the Trial Court appointed Architect Tari as Court Commissioner to visit the suit flat and to submit report about the repairs carried out and the nature of incomplete work. The Commissioner submitted his report on 14/10/2005. Thereafter on 17/04/2007 the defendant filed Notice of Motion No.1389 of 2007 seeking permission to carry out repairs as

suggested by the Architect. However, the said application was dismissed by the learned Trial Judge holding that defendant's similar request made earlier was rejected and he had also not cleared the society's dues though statement was made before the Trial Court as well as the High Court that he would clear the society's dues.

6. Being aggrieved by the above mentioned order the defendant has filed the present appeal. In this appeal before me, the learned Advocate for the defendant submitted that defendant intends to carry out only those repairs for which permission of the Corporation is not necessary and if the permission to repair the suit flat is not granted then defendant can not use the flat and greater hardship will be caused to the defendant. He also submitted that if repairs as prayed are carried out no prejudice is likely to be caused to the Plaintiff. He also submitted that the learned Trial Judge has not properly considered the Commissioner's reports and has wrongly dismissed the Notice of Motion. He, therefore, submitted that the appeal be allowed and the defendant be permitted to carry out repairs as mentioned in the Commissioner's

report. As against this, Shri Kini, learned Advocate for the Plaintiff-society supported the order passed by the Trial Judge. He submitted that defendant has not cleared the society's dues. The defendant intends to carry out additions and material alterations in the suit flat which are not permissible as per the society's Bye laws as well as as per the provisions of Bombay Municipal Corporation Act. He therefore submitted that appeal be dismissed.

7. It is not in dispute that the suit flat is in possession of the defendant. It also very clear from the pleadings of the parties as well as from the affidavits filed by both the sides and photographs produced on record that the defendants started doing major repairs to the suit flat. He in fact demolished the balcony. In order to find out the present condition of the suit flat as well as the repairs that have been already carried out and the repairs which are yet to be carried out, the Trial Court appointed Subhod Tari, Expert Architect as Court Commissioner. Accordingly, he visited the suit flat and submitted report on 14/10/2005. It must be noted that the learned Trial Judge has dismissed the Notice of Motion mainly on the

ground that the defendant had made similar request previously but the same was turned down and his application for modification of the injunction order was rejected by the Trial Court on 16/06/2005 and the appeal preferred against the said order was also dismissed. However, in my opinion, the learned Trial Judge has lost sight of the fact that when the said application was rejected the Commissioner's Report was not on record. Now the present Notice of Motion was filed mainly on the basis of the Commissioner's Report. So, we have to consider the present Notice of Motion independently, without considering as to what had happen when earlier application for modification of order was rejected.

8. The Commissioner has mentioned in Paragraph-7 of the report, the major work which was already carried out in the suit flat. He has also mentioned in the paragraph no.8 on going repair work and observed that as a result of the Court's order some work has remained out of ongoing repair work. Then he has also mentioned in paragraph-11A that there is no need to obtain Municipal permission for following repair works carried out and or proposed to be carried out by the Defendant:

....7/-

- i) Changing floor tiles and dado work*
- ii) Plastering and painting*
- iii) Doors and windows replacement*
- iv) Fixing safety grills to windows.*
- v) Plumbing, drainage and electrical works."*

Then in clause-11(b) and (c) he has made following observations.

"b) However the enclosure of balconies requires Municipal permission. Since the enclosed balconies are existing and if, the permission to enclose is not obtained, in that case it needs to be regularized by paying penalty to the Municipal Corporation of Greater Mumbai.

c) Similarly making provision of another entrance to the flat if any other than that existing main door near staircase, will require prior Municipal permission."

9. From the photographs which are produced on

record it appears that the defendant has in fact, demolished the balconies and now he intends to carry out the work with regard to fixing doors and windows to the suit flat and to complete certain brick work for fixing the said windows and doors. From the report of the Commissioner and the photographs it appears that under the guise of repairs, the defendant is trying to extend original carpet area of the flat or to include the balcony portion in the attached room. It is needless to say that the flat owner can not carry out such construction, repairs or additions or renovation without prior permission of the society as well as of the Corporation. As per clause-47 and 48 of the bye laws of the Plaintiff-society it is necessary for the defendant or any flat owner to obtain previous permission of the society in carrying out repairs in the suit flat. Though it is tried to be suggested that the defendant had obtained such permission from one of the members of the committee, the defendant has not produced any document to show that such permission was in fact granted and one who granted the permission had authority to grant such permission. So, one thing is certain that the defendant has not obtained necessary permission from the society for carrying out

alteration/repairs/renovations. However, at the same time, there are certain incomplete repairs such as plastering of the walls which are in existence as per the original plan or the electric wiring of the suit flat or repairs of the drainage pipes which can be carried out by the defendant after obtaining permission for the same from the society. So, instead of rejecting Notice of Motion in toto the learned Trial Judge ought to have passed a suitable order as a result of which defendant could have carried out such repairs which are permissible.

10. It is evident from the record that when the appeal from order No.714 of 2005 was heard, Appellant had made a statement that society's dues will be deposited. So, naturally, it is necessary to see whether the defendant has made the payment accordingly. So, having regard to all these facts and circumstances I pass the following order :-

O R D E R

1. Appeal from order is partly allowed.
2. The order passed in Notice of Motion No.1389 of 2007 by the Judge, City Civil Court, Bombay on 29/06/2007 is set aside.

....10/-

3. The Notice of Motion No.1389 of 2007 is partly allowed. The defendant is permitted to carry out the repairs as mentioned in Clause-11(A) of the Court Commissioner Report dated 14/10/2005 after obtaining prior permission for the same from the Plaintiff-society as per Clause-47 and 48 of the Bye laws of the Plaintiff-Society. However, it is made clear that while fixing or replacing windows and doors he should not change the original place of the said windows and doors which was in existence as per the original sanctioned plan. It is also made clear that under the guise of fixing windows and doors the defendant shall not include the balcony portion in the adjoining room or increase the carpet area of the room adjoining to the balcony without obtaining prior written permission for the same from the Bombay Municipal Corporation and from the society.

4. The defendant is permitted to carry out the repairs mentioned in Clause-11(A) of the above terms and conditions and only if the defendant clears the entire society's dues and obtain no due certificate from the society.

5. Under the circumstances, Plaintiff is directed to pay costs of this appeal to the Plaintiffs' society and bear his own.

(S.R.SATHE, J.)

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